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No. 82-1131

In the Supreme Court of the United States

October Term, 1982

KENNETH WILLIAM WHEAT,
Petitioner,

vs.

STATE OF MISSISSIPPI,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. WHERE PETITIONER ADMITS HE HAS NEVER PRESENTED THE CONSTITUTIONAL CLAIM CONCERNING THE DETERMINATION OF HIS COMPETENCY TO THE COURT BELOW THIS COURT IS WITHOUT JURISDICTION TO DECIDE THE ISSUE AND CERTIORARI SHOULD BE DENIED.

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Respondent, State of Mississippi, respectfully prays that the Petition For Writ Of Certiorari to the Supreme Court of Mississippi be denied in this case.

OPINION BELOW

The opinion of the Supreme Court of Mississippi is reported as *Kenneth William Wheat v. State of Mississippi*, 420 So.2d 229 (Miss.1982). A copy of the opinion is before the Court as an Appendix 1 to the Petition For Writ Of Certiorari.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court by way of a Petition For Writ Of Certiorari through the authority of 28 U.S.C. 1257(3). He has failed to do so.

STATEMENT OF THE CASE

Petitioner, Kenneth William Wheat, was indicted for the crime of capital murder by the Grand Jury of the Circuit Court of the First Judicial District of Harrison County, Mississippi during the September 1979 Term. The indictment grew out of the July 29, 1979 slaying of Joseph M. Mayer and his wife Teresa Hayes Mayer by petitioner.

Petitioner was tried during the January 1980 Term of the Harrison County Circuit Court. His bifurcated trial was conducted under the procedures set forth in Sections 99-19-101 to 107, Miss. Code Ann. (Supp.1977), and *Jackson v. State*, 337 So.2d 1242 (Miss.1976). At the conclusion of the first stage of the bifurcated trial the jury retired to consider the issue of guilt. After deliberation the jury returned a verdict of capital murder. The trial then continued into the second or sentencing stage. After hearing additional testimony and hearing arguments of counsel the jury retired to consider sentence. After deliberation the jury returned a sentence of death in the proper form.[1]

On automatic review to the Mississippi Supreme Court the conviction and sentence of death was affirmed by a unanimous court on October 6, 1982. *Wheat v. State*, 420 So.2d 229 (Miss.1982). No petition for rehearing was filed as petitioner had dismissed his retained counsel and refused to employ others until shortly before the December 8, 1982 execution date.

On November 26, 1982 this Court stayed petitioner's execution date pending filing, consideration and disposition of this petition.

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1. Petitioner was tried during the December 1979 Term for the killing of Mrs. Mayer. He was convicted of capital murder and sentenced to life for that crime.

The facts, as reflected by the record, show that on July 28, 1979 Teresa Carol Hayes and Joseph M. Mayer were married in St. Thomas Moore's Church in Paducah, Kentucky. After the wedding and following a reception the newlyweds set off on their honeymoon. They spent their first wedded night in a Memphis, Tennessee motel. The following day Sunday, July 29, 1979 they set out for their final destination; Gulfport, Mississippi. In midafternoon the couple arrived in Gulfport and registered at the Worth Motor Lodge paying in advance for several days. The couple called their parents on the telephone and told them of their safe arrival.

The couple then went to dinner at the nearby, Friendship House Restaurant. After leaving the restaurant nothing more was seen of the couple until their bodies were discovered in a wooded area of rural Harrison County, Mississippi on July 31, 1979. Both had been shot in the head. Without more we would be at a total loss as to by whose hands this newlywed couple met their untimely demise.

However this dark night fate was on the side of right and justice. The perpetrator of this horrible crime had a mishap as he was attempting to flee the scene of his crime.

Appellant had taken his victims to a remote area and executed both. He had bound Joseph Mayer's hands and feet with pieces of his own clothing before shooting him at point blank range in the back of the head. After executing both Mayer and his wife he took their car. As he was driving back to the main road he hit a washed out place in the gravel road throwing the car into the ditch. He could not get it out alone. He went seeking help. He found what he needed at a trailer where Algie and Revina Netto lived with their daughter and Mrs. Netto's two adult sons, Gary Wayne and Eugene Walker. Appellant arrived at

the trailer sometime shortly after midnight. He knocked on the door and requested help and a glass of water. The two Walker boys went with appellant in Eugene's truck to the place where the car was stuck. After looking the situation over the three returned to the trailer to get a tractor. At this point Mr. Netto joined the group. The four of them returned to the car. After trying unsuccessfully to pull the car free with the tractor, Mr. Netto sent his stepsons back to the trailer to get shovels. They returned and dug the dirt from under the car. They were finally able to pull the car free with the tractor. When the car was on the road again it was discovered that one of the front tires had been blown out in the accident. The Walker boys changed the tire having to remove two chrome lug nut covers in the process. Appellant stood by and watched as Mr. Netto and the Walker boys did all the work to free the car. After getting the car in running condition again appellant followed Mr. Netto and his stepsons back to the trailer to get some more water and directions. He asked directions to Melva's Cafe and was directed there by Mr. Netto. In all appellant spent an hour and a half to two hours with the Netto/Walker family. During this period they noticed that appellant wore a sweet smelling aftershave lotion, that he had on slip-on tennis shoes and a light colored golf shirt and dark trousers. They also noticed his Vandyke beard and his receding hairline with his hair slicked back. They mentioned that he spoke with an accent not common to the area. They also noticed that the car he was dri ing was brown with a beige landau vinyl top bearing a Kentucky license plate. All four of the adult residents of the Netto/Walker home were able to positively identify appellant in open court.

A composite picture was prepared by Gary Wayne Walker and it was furnished to the news media. A deputy sheriff in Pearl River County recognized the picture and contacted the Harrison County authorities. Appellant was

arrested in Orlando, Florida on October 19, 1979, on another charge. He soon told the Florida authorities who he actually was and thereafter waived extradition and returned to Mississippi to stand trial.

REASONS FOR DENYING THE WRIT

Petitioner attempts to raise the only issue he presents here for the first time on this petition. He freely admits that he has not raised the "Constitutional implications" of the issue presented here in the section of his petition entitled "How The Federal Question Was Presented And Decided Below." (Petition at 28).

Under the rationale of *Webb v. Webb*, 451 U.S. 493 (1981) and *Cardinale v. Louisiana*, 394 U.S. 437 (1969), this Court lacks jurisdiction to decide an issue that has never been presented to the state courts or was not presented in a federal constitutional context to the state courts. This fact being admitted by petitioner, his attempt to invoke the jurisdiction of this Court fails.

Admittedly petitioner raised, on direct appeal, before the court below an issue concerning the lack of an examination by a psychiatrist before trial. However, this issue was not couched in federal constitutional terms nor did the argument have basis in fact.

Below, petitioner argued that the trial court refused to order a mental examination, this was shown to be false. *Wheat v. State*, 420 So.2d 229, 232-38. Three motions for mental examination were filed. The first motion filed by the petitioner was withdrawn at his insistence. 420 So.2d at 233. The second filed by the State was opposed by petitioner and after a hearing was denied. 420 So.2d at 233-35. The third, filed by petitioner, came during his trial for the capital murder of Teresa Mayer, between the guilt and sentence phases. The trial court granted this

motion and arranged for the examination. When taken before the psychiatrist petitioner refused to undergo the examination. 420 So.2d at 235-36.

If petitioner had succeeded in invoking the jurisdiction of this Court, which he has not, his argument would have been without merit. Petitioner's motion for examination was granted. He was taken to the psychiatrist for examination. He refused to speak or cooperate in any manner. Petitioner says he should have been forced to undergo the examination. The ridiculousness of the attempt to lay at the feet of the State petitioner's non-cooperation in what he had requested is beyond belief.

Petitioner has not presented any issue to this Court of which it has jurisdiction.

CONCLUSION

For the reasons stated above the Petition For A Writ Of Certiorari To The Supreme Court Of Mississippi should be denied.

Respectfully submitted,

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